DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

JUN 23 1999

CAU-N-112539-98
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MEMORANDUM FOR ASSISTANT COMMISSIONER (INTERNATIONAL) CP:IN
Attn: Steve Flesner

FROM: Cynthia J. Mattson
Assistant Chief Counsel (International)

SUBJECT: Tax Treaty Secrecy and NARA

This responds to your request for a legal opinion concerning a Records Control System (hereafter "RCS") that was proposed by the IRS and approved by the National Archives (hereafter "NARA") in 1988. The RCS covers certain files maintained by the Assistant Commissioner (International). Specifically, pursuant to the RCS, documents that are International Organization Files are classified as "permanent" and must be transferred to NARA in 5-year blocks when 30 years old. The transfer of records from the IRS to the National Archives is scheduled to begin in 2001 and will presumably include records relating to 1966 through 1970. International Organization Files are described as follows in the RCS:

> Various documents, including books and agendas of meetings of international organizations, cooperative groups such as PATA, Group of Four, and the OECD [hereafter "Files"].

Specifically, the Files contain pre-meeting correspondence; discussion papers; talking outlines; overviews of discussion topics; press releases; briefing books; and meeting agendas. The Files do not contain taxpayer-specific information. After transfer to NARA, the documents will be open to public inspection.

In 1988, the IRS apparently did not recognize that some of the documents covered by the RCS were received by the U.S. competent authority pursuant to exchanges of information under bilateral income tax treaties or, in the case of documents relating to the Organization of Economic Cooperation and Development, an international convention. You asked us whether there is a basis for the IRS to assert that public access to the Files is barred, regardless of the age of the documents. If there is such a basis, the IRS will request that NARA give the Files further protection, pursuant to Title 44, sec. 2108 (Responsibility for custody, use, and withdrawal of records), which contains the following:

> when the head of a Federal agency states, in writing, restrictions that appear to him to be necessary or desirable in the public interest with respect to the use or examination of records being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs, , [sic] impose such restrictions on the records so transferred, and may not relax or remove such restrictions without the written concurrence of the head of the agency from which the material was transferred....

A substantial portion of the documents in question consist of briefing books for meetings of the Pacific Association of Tax Administrators (hereafter "PATA") , the Group of 4, and the Organization of Economic Cooperation and Development (hereafter "OECD").

For the reasons explained below, it is our view that it would be a violation of the treaty obligations of the United States for the IRS to turn over to NARA certain of the information in question that was received by the U.S. competent authority from a treaty partner or from the OECD with a restricted classification.

Background

PATA was organized in 1980 and is composed of representatives of the national tax administrations of the United States, Canada, Australia, and Japan. PATA generally holds two meetings a year, a meeting of competent authorities in the Spring and a meeting of commissioners in the Fall. Specific taxpayers are not discussed at these meetings, although lower level working groups may focus on particular industries or types of taxpayers. Exchanges of information between PATA members are made pursuant to and in accordance with the exchange of information articles in the bilateral tax conventions between the member States.

The Group of 4 is similar in organization to PATA and is composed of representatives of the tax administrations of the United States, the United Kingdom, Germany and France. As is the case with PATA, exchanges of information are made pursuant to and in accordance with the exchange of information articles in the bilateral tax conventions between the member States; and individual cases and taxpayer-specific information are not discussed or exchanged in connection with the Group's activities.

In contrast to PATA and the Group of 4, information exchanges between member countries of the OECD are not made under the authority of exchange of information articles in bilateral tax treaties.

The Convention on the Organisation for Economic Co-Operation and Development was signed on December 14, 1960, ratified by the U.S. Senate on March 16, 1961,

and entered into force as to the United States on September 30, 1961. Under Article 3 of the Convention, the member States are required to

> (a) keep each other informed and furnish the Organisation with information necessary for the accomplishment of its tasks;
>
> (b) consult together on a continuing basis, carry out studies and participate in agreed projects; and
>
> (c) co-operate closely and where appropriate, take coordinated action.

It is pursuant to Article 3 that exchanges of information in connection with OECD activities are made between the Organization's members.

DISCUSSION

I. PATA and Group of 4

1. Exchange of information articles

Each of the treaties between the United States and the members of PATA and the Group of 4 contains an exchange of information article that authorizes the Contracting States to exchange information that is relevant to the administration of the treaty or to the administration of a domestic tax that is covered by the treaty. Further, each of these articles contains a nondisclosure provision, as follows:

a. Income tax treaties between the United States and PATA countries:

Australia

Article 25 of the United States-Australia Income Tax Convention, TIAS 10773, 1986-2 C.B. 220, that entered into force on October 31, 1983, includes the following:

> (1) The competent authorities shall exchange such information as is necessary for carrying out the provisions of this Convention or for the prevention of fraud or for the administration of statutory provisions concerning taxes to which this Convention applies provided the information is of a class that can be obtained under the laws and administrative practices of each Contracting State with respect to its own taxes.

> (2) Any information so exchanged shall be treated as secret and **shall not** be disclosed to any persons other than those (including a Court or administrative body) concerned with the assessment, collection, administration or enforcement of, or with litigation with respect to, the taxes to which this Convention applies. [Emphasis added.]

The 1983 treaty with Australia replaced a 1953 treaty. Article XVIII of the 1953 treaty, concerning exchanges of information, is substantially identical to Article 25 of the current treaty.

Canada

Article XXVII of the United States-Canada Income Tax Convention, TIAS 11087, 1986-2 C.B. 258, effective August 16, 1984, includes the following:

> 1. The competent authorities of the Contracting States shall exchange such information as is relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes to which the Convention applies....
>
> * * *
>
> Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the taxation laws of that State and **shall be disclosed only** to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to taxes to which the Convention applies or, notwithstanding paragraph 4, in relation to taxes imposed by a political subdivision or local authority of a Contracting State that are substantially similar to the taxes covered by the Convention under Article II (Taxes Covered). Such persons or authorities shall use the information **only** for such purposes. They may disclose the information in public court proceedings or in judicial decisions.... [Emphasis added.]

The 1984 treaty with Canada replaced a 1942 treaty. The exchange of information article in the 1942 treaty did not contain a nondisclosure provision.

Japan

Article 26 of the United States-Japan Income Tax Convention, TIAS 7365, 1973-1 C.B. 630, that entered into force on July 9, 1972, includes the following:

> (1) The competent authorities of the Contracting States shall exchange such information as is pertinent to carrying out the provisions of this

> Convention or preventing fraud or fiscal evasion in relation to the taxes which are the subject of this Convention. Any information so exchanged shall be treated as secret and **shall not** be disclosed to any persons other than those (including a court or administrative body) concerned with assessment, collection, enforcement, or prosecution in respect of the taxes which are the subject of this Convention. [Emphasis added.]

The 1972 treaty with Japan replaced a 1954 treaty. Article XVII(1) of the 1954 treaty, concerning exchanges of information, is substantially identical to Article 26 of the current treaty.

b. Income tax treaties between the United States and Group of 4 countries:

France

Article 27 of the United States-France Income Tax Convention, that entered into force on December 30, 1995, includes the following:

> 1. The competent authorities of the Contracting States shall exchange such information as is pertinent for carrying out the provisions of this Convention and of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is not contrary to this Convention. ... Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and **shall be disclosed only** to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Convention. Such persons or authorities shall use the information **only** for such purposes. They may disclose the information in public court proceedings or in judicial decisions. [Emphasis added.]

The 1995 treaty with France replaced a 1967 treaty. Article 26 of the 1967 treaty, concerning exchanges of information, is substantially identical to Article 27(1) of the current treaty.

Germany

Article 26 of the United States-Germany Income Tax Convention, that entered into force on August 21, 1991, includes the following:

> 1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of the

> Convention and of the domestic law of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is not contrary to this Convention. ... Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed **only** to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by this Convention. Such persons or authorities shall use the information **only** for such purposes. They may disclose the information in public court proceedings or in judicial decision, unless the competent authority of the Contracting State supplying the information raises an objection. [Emphasis added.]

The 1991 treaty with Germany replaced a 1954 treaty. Article XVI(1) of the 1954 treaty, concerning exchanges of information, is substantially identical to Article 26(1) of the current treaty.

United Kingdom

Article 26 of the United States-United Kingdom Income Tax Convention, TIAS 9682, 1980-1 C.B. 394, that entered into force on April 25, 1980, includes the following:

> (1) The competent authorities of the Contracting States shall exchange such information (being information available under the respective taxation laws of the Contracting States) as is necessary for carrying out the provisions of this Convention or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of this Convention. Any information so exchanged **shall be treated** as secret but may be disclosed to persons (including a court or administrative body) concerned with the assessment, collection, enforcement or prosecution in respect of taxes which are the subject of this Convention. [Emphasis added.]

The 1980 treaty with the United Kingdom replaced a 1946 treaty. Article XX(1) of the 1946 treaty, concerning exchanges of information, is substantially identical to Article 26(1) of the current treaty.

The exchange of information articles in U.S. tax treaties authorize only exchanges of information that is relevant to administration of the specific treaty or for the administration of a covered tax of one of the Contracting States. Information that is not relevant to one of these purposes is outside of the authorization contained in the exchange of information articles and, therefore, is outside of the protection from

disclosure accorded by the treaty. For example, logistical information in a PATA or Group of 4 briefing book that describes hotels or points of interest at a meeting site is not covered by an exchange of information article or its protection from disclosure. Similarly, documents in the Service's administrative file for a PATA or Group of 4 meeting concerning dates and locations of meetings and briefings; personal information of individuals who will attend meetings; and courtesy letters sent after a meeting are outside of the protection afforded by an exchange of information article.

The exchange of information articles in U.S. tax treaties contain two independent restrictions on the ability of the United States to disclose information it receives pursuant to an exchange of information article, both of which must be observed before the information may be disclosed. First, the secrecy clause of the non-disclosure provisions requires the United States to treat any information received as secret in the same manner as information obtained under domestic laws. Second, and in addition, the tax enforcement clause of the non-disclosure provisions prohibits the United States from disclosing any information received to persons other than those (including a court or administrative body) concerned with assessment, collection, administration, enforcement or prosecution in respect of the taxes covered by the treaties.

Under the secrecy clause of the non-disclosure provision, information, including the identity of the treaty country from which the information was received, is treated as secret (i.e. non-disclosable) by the receiving treaty partner in the same manner as information obtained under the domestic laws of that country.[1]/ For example, information received by the United States from a treaty partner that contains taxpayer specific information would be treated as taxpayer return information under section 6103.

Second, under the tax enforcement clause, a separate and independent restriction from the secrecy clause, information that is received from a treaty partner, and that is covered by a treaty nondisclosure provision, may not be disclosed to persons or authorities other than those concerned with the assessment, collection, administration, enforcement or prosecution of, or with litigation with respect to, the taxes that are the subject matter of the particular treaty. As an example, such information may not be disclosed by the receiving State to other government agencies for non-tax administration purposes.

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[1]/ Although the treaty with the United Kingdom states information "exchanged", in contrast to information "received" may not be disclosed, the Service interprets the U.K. treaty as protecting only information received.

It is our view that disclosure to NARA of information received from a treaty partner and covered by a nondisclosure provision will violate the treaty, since NARA is not a person concerned with the assessment, collection, prosecution, or administration of a tax covered by the treaties. This prohibition will require a review of documents covered by the Records Control System to withhold those documents that contain or refer to information received from our treaty partners.

Our view that NARA is not a person to which the IRS may disclose treaty information is not unlike the position that the IRS took with respect to tax return information. That is, prior to amendment of section 6103 in the IRS Restructuring and Reform Act of 1998, P.L. 105-206, § 3702, it was the IRS's position that section 6103 barred it from turning over tax return information to NARA. P.L. 105-206 amended section 6103 by adding subsection (l)(17), in part, as follows:

> DISCLOSURE TO NATIONAL ARCHIVES AND RECORDS ADMINISTRATION.-The Secretary shall, upon written request from the Archivist of the United States, disclose or authorize the disclosure of returns and return information to officers and employees of the National Archives and Records Administration for purposes of, and only to the extent necessary in, the appraisal of records for destruction or retention.

Our interpretation of the scope of the exchange of information articles and the non-disclosure provision is also supported by the official commentary accompanying the OECD Model Tax Convention on Income and on Capital (hereafter "OECD Model") (1977 and 1997). The official commentary to the exchange of information article in the OECD Model, which article is very similar to those at issue herein, reflects the views of the United States on implementation of the non-disclosure provisions of treaties, as well as the views of the other OECD member countries, including Canada, Australia, Japan, France, Germany, and the United Kingdom. The official commentary includes the following:

> 5. The main rule concerning the exchange of information is contained in the first sentence of the paragraph. The competent authorities of the Contracting States shall exchange such information as is necessary to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention even if, in the latter case, a particular Article of the Convention need not be applied. ... In order to keep the exchange of information within the framework of the Convention, a limitation to the exchange of information is set so that information should be given only insofar as the national tax in question is covered by the Convention and the taxation under the domestic taxation laws concerned is not contrary to the Convention. An illustration may be cited in this connection: a request for information concerning the imposition of a

sales tax need not be complied with by the requested State as it is not covered by the Convention.

* * *

11. Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their cooperation. At the same time maintenance of such secrecy in the receiving Contracting State is a matter of domestic laws. It is therefore provided in paragraph 1 that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State.

12. The information obtained may be disclosed **only** to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. This means that the information may also be communicated to the taxpayer, his proxy or to the witnesses. The information received by a Contracting State may be used by such persons or authorities **only** for the purposes mentioned in paragraph 1. If the information appears to be of value to the receiving State for other purposes than those referred to, that State may not use the information for such other purposes but it must resort to means specifically designed for those purposes (e.g. in case of a non-fiscal crime, to a treaty concerning judicial assistance). [Emphasis added.]

Official Commentary to Article 26 of the 1977 and 1997 OECD Models, paras. 5, 11, 12.

The 1997 OECD Model contains the following additional, relevant commentary:

12.1 Under this Article, information may not be disclosed to authorities that supervise the general administration of the Government of a Contracting State, but are not involved specifically in tax matters. In their bilateral negotiations, however, Member countries may agree to provide for disclosure to such supervisory bodies.

Official Commentary to Article 26 of the 1997 OECD Model, para. 12.1.

Reliance on the OECD Model and Commentary is appropriate for determining the intention of the Contracting States with respect to the meaning of a term in an

income tax treaty. See, e.g., Taisei v. Commissioner, 104 T.,C. 535 (1995); and North West Life Assurance v. Commissioner, 107 T.C. 363 (1996).

II. **Organization for Economic Cooperation and Development**

Information exchanged between member countries of the OECD in connection with OECD activities are exchanged pursuant to the OECD Convention and are protected from disclosure to the extent required by this Convention.

Confidentiality provisions in the OECD Convention

Pursuant to Article 3 of the OECD Convention, the member States are required to exchange information to fulfill the purposes of the Organization; to consult and work together on agreed projects; and to cooperate and take coordinated action.

1. Procedures Prior to September 1, 1997

In 1962, the OECD adopted procedures for the classification of documents. The subject of the designation of levels of confidentiality of OECD documents is summarized in item #109 of the OECD Resolution dated May 22, 1962. The resolution determined that OECD documents should be classified at one of the three following levels:

> CONFIDENTIAL - For documents, information or texts the unauthorized disclosure of which would seriously prejudice the interests of the Organisation or any of its Members.
>
> RESTRICTED - For documents, information or texts which should not be communicated except for official purposes.
>
> GENERAL DISTRIBUTION - For documents, information or texts which are neither confidential nor restricted.

Further, the 1962 resolution required the Secretary-General to institute procedures to ensure that all OECD documents are classified under one of the three categories and asked the Secretary-General and member States "to ensure the security of confidential and restricted documents, information or texts."

In a letter dated January 19, 1995 from Assistant Secretary (Tax Policy) Leslie Samuels to U.S. Senator Byron Dorgan (who had requested information regarding OECD transfer pricing policies), Mr. Samuels stated that the United States is required to comply with restrictions adopted by the OECD with respect to the disclosure of its documents. Mr. Samuels further noted that documents classified

as 'confidential' or 'restricted, "may not be released without the prior agreement of the OECD member States."

2. Procedures After September 1, 1997

On July 10, 1997, the OECD Council adopted the "Resolution on the Classification and Declassification of Information". This resolution, which contains new information classification categories is effective as of September 1, 1997, and prospectively replaces the May 22, 1962, Resolution described above. The new classification categories are similar to the prior categories and are contained in ¶ 2 of the Resolution and ¶¶ 5-8 of the "Annex" as follows:

CONFIDENTIAL - for information the unauthorized disclosure of which would seriously prejudice the interests of the Organisation or any of its Member countries.

FOR OFFICIAL USE - For documents, information or texts which should not be communicated except for official purposes.

UNCLASSIFIED - material whose disclosure would not prejudice the interests of the Organisation or its member countries.

The new "Confidential" category is the same as the classification under the earlier resolution, and the "Official Use" category roughly corresponds to the "Restricted" provision under the earlier resolution. Also, paragraph 4 of the new resolution requires that "[t]he Member countries and the Secretary-General will take the necessary measures to ensure the security of official information."

The OECD Resolution of July 10, 1997, contains new procedures (at ¶¶ 5-11) for the "downgrading" and "declassification" of information which was not part of the May 22, 1962, Resolution. For example, after 3 years, information originally classified as "confidential" will automatically be "downgraded" to "For Official Use" status. Paragraph 11 of the resolution makes it clear, however, that classified information will not be automatically "downgraded" or "declassified" if a Member objects. The "Annex" to the new resolution, entitled "Guidelines for Implementation", provides more details regarding the scope and process of classification. For example, Annex paragraph 7 indicates that information under the "For Official Use" classification may be provided to "academics, NGOs[2], industry, etc.", when technical consultation outside of government is "necessary and appropriate."

[2]Nongovernmental organizations.

The IRS may not freely disclose classified OECD information, because the IRS is bound by the terms of the OECD Convention, including the restrictions imposed on all OECD members by the organization's information classification system. Thus, OECD documents classified "Confidential" or "Restricted" pursuant to the 1962 resolution, or "Confidential" or "For Official Use" pursuant to the 1997 resolution, may not be disclosed by the IRS to NARA.

Executive Order 12958 (dated April 17, 1995), "prescribes a uniform system for classifying, safeguarding, and declassifying national security information." The term "national security" is defined in section 1.1(a) as "the national defense or foreign relations of the United States." The term "information" is broadly defined in section 1.1(b) as-

> any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

Information may be classified under the Executive Order if it falls within the specific categories listed in section 1.5, including "Foreign Government Information", which is defined in section 1.1(d) as:

> (1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;
>
> (2) information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information , the arrangement, or both, are to be held in confidence; **** . [Emphasis added.]

With respect to a classification given a document by a foreign government or international organization, section 1.7(e) of Executive Order 12958 provides that

> Foreign government information **shall retain its original classification markings** or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information. [Emphasis added].

Consequently, documents that are classified as either "Confidential", "For Official Use" or "Restricted" under the OECD procedures referred to above (i.e., the Resolutions of May 22, 1962 or July 10, 1997) should also be protected from

disclosure by Executive Order 12958. As indicated earlier, the definition of "Foreign Government Information" covers both "inbound" and "outbound" situations. Thus, the definition encompasses, OECD information "provided to" the IRS and information "produced by" the IRS and classified by the OECD.

We are not aware of any reclassification by the IRS of OECD information that is "provided to" the IRS; and Executive Order 12958 supports the view that the original OECD classification of such information is sufficient to protect the confidentiality of the information in the hands of the IRS. Information that is "produced by" the IRS in connection with its participation in the OECD may also be protected as "Foreign Government Information" under Executive Order 12958, provided that the OECD has classified and marked such information as "Confidential", "For Official Use" or "Restricted" under OECD procedures.

As an alternative to the classification by the OECD, or in addition to the OECD's classifying information produced by the IRS, the IRS may itself classify and mark sensitive information that it produces in OECD matters under the U.S. system of classification. Section 1.3(a) of Executive Order 12958 provides for three classification levels:

> (1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security ***.
>
> (2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security ***.
>
> (3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security ***.

Generally, information classified pursuant to Executive Order 12958 retains its classification for 10 years. Sec. 1.6(b). However, the 10-year classification period will not apply, and a document will remain classified if disclosure could reasonably be expected to cause damage to the national security for a period greater than that provided in paragraph (b) ***, and the release of which could reasonably be expected to:

* * *

> (5) reveal foreign government information;

> (6) damage relations between the United States and a foreign government, ***, seriously undermine diplomatic activities that are reasonably expected to be ongoing for a period greater than that provided in paragraph (b), above;
>
> * * *
>
> (8) or violate a statute, treaty, or international agreement. [Executive order 12958, Sec. 1.6(d)].

We think that there is a sound basis for taking the position that any sensitive documents received from or sent to the OECD by the IRS, papers prepared for OECD meetings, minutes of meetings, and summaries of proceedings and confidential reports or analyses fall within the definition of "Foreign Government Information" in section 1.1(d) of Executive Order 12958, and thus are subject to classification under section 1.3.

In cases of sensitive documents that are not originally classified by the OECD, a document-by-document analysis by the IRS may be necessary in making the determination regarding the "level" of classification, i.e., "Top Secret", "Secret" or "Confidential." These determinations are based on the degree of potential "damage to national security" of the United States that could be caused by the unauthorized disclosure of any given item of information.

The phrase "damage to the national security" is defined in section 1.1(l) of the order as-

> harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information. [Emphasis added.]

There seems little doubt that there would be harm to U.S. foreign relations if the U.S. membership in the OECD was jeopardized because the IRS is unable to guarantee the confidentiality of OECD documents.

Executive Order 12958 also provides for "derivative classification" of information. Sec. 2.1(a) defines "derivative classification" as-

> the incorporating, paraphrasing, restating or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information.

Derivative classification may be particularly relevant for purposes of protecting IRS notes and summaries of information contained in documents that the OECD has classified as "Confidential", including minutes of OECD meetings; intra-agency

memoranda relating to information in classified documents; as well as briefing books that refer to, or contain copies of information in classified documents.

The critical point is whether a document prepared or submitted by the IRS to, or received by the IRS from the OECD, is classified and marked either under the OECD procedures established in 1962 or 1997, or under the U.S. procedures specified in the Executive order. Internal IRS or Treasury documents that summarize or refer to classified OECD information should be given "derivative classification", when appropriate.

We recommend that the IRS decline to turn over to NARA information that the OECD classified "Confidential" or "Restricted" pursuant to the 1962 resolution; information that the OECD classified as "Confidential" or "For Official Use" pursuant to the 1997 resolution; and information classified by the IRS, including derivative classification, pursuant to Executive Order 12958.

If you have further questions or if we can be of any additional assistance, please call Ed Williams at (202) 622-3268.